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In The Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT BRACE AND ROBERT BRACE FARMS, INC.,
a Pennsylvania corporation,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, pursuant to 33 U.S.C. § 1344(f)(1)(A), a farmer's conversion of pastureland into crop-bearing fields is "normal farming" activity exempt from the Section 404 permit requirements of the Clean Water Act.

2. Whether the Army Corps of Engineers' regulation providing that "[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of waters of the United States," 33 C.F.R. § 323.4(c), is an overbroad and unauthorized construction of the "recapture provision" of the Clean Water Act, 33 U.S.C. § 1344 (f)(2).

RULE 29.1 STATEMENT AND PARTIES TO THE PROCEEDING

Petitioners Robert Brace and Robert Brace Farms, Inc. have no parent or non-wholly owned subsidiary corporations.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 19a-41a) is reported at 41 F.3d 117 (3d Cir. 1994). The opinion of the district court (App., *infra*,1a-18a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 22, 1994 and a timely petition for rehearing was denied on January 9, 1995. App.,

infra, 42a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory and regulatory provisions relevant to this case are set forth at App., *infra*, 43a-44a.

STATEMENT

This appeal involves a judicial and regulatory override of federal legislation exempting normal agricultural activities from the permit requirements of the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq*. Through misconstruction, disregard of relevant facts and inappropriate deference to unreasonable agency regulations, the court of appeals has further muddied federal wetlands jurisprudence to the detriment of the Nation's farmers — a community which Congress specifically intended to spare, under routine circumstances, from the burdens of a complex regulatory program.

A. Factual Background

Petitioner Robert Brace ("Brace") farms approximately 600 acres of farm land in Erie County, Pennsylvania. Among Brace's land holdings is his family's 140 acre homestead farm that he purchased from his father in 1975. This land has been continuously farmed by the Brace family since the 1930s. This litigation concerns Brace's attempt to refurbish and improve agricultural drainage on the homestead farm so as to integrate that farm into his primary farming business operation, which is producing row crops. Brace's efforts have been frustrated by federal enforcement of wetlands regulations because approximately 30 acres of the homestead farm are considered to be "wetlands" and subject to regulation by the U.S. Army Corps of Engineers ("COE") as navigable waters of the United States.

Prior to 1977, Brace's father and brother used the homestead farm including the area now referred to as the Site for pasturing cows and horses. In 1976, Brace decided to improve the

farm by updating and expanding the existing drainage system, parts of which had fallen into disrepair. Following a plan prepared by the Agricultural Stabilization and Conservation Service, an agency of the United States Department of Agriculture, Brace began in 1977 to clean and improve the drainage system. As resources permitted, Brace reopened a drainage channel to allow the water to flow in its natural direction and replaced or installed drainage tile throughout the 140 acre farm.[1] In so doing, Brace did not introduce any new or foreign fill onto the Site. The only "discharge" in this case was Brace's "sidecasting" or redepositing of soil or sediment which had washed off his farmland into the drainage ditches.

The improvements to the drainage system were completed and the farm's integrated drainage system was operating in 1977.[2] As the district court noted, "The drainage system impacts the ability to produce crops on all parts of Brace's property; without such a system, the property is not suitable for farming [production of row crops] because of soil conditions."

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[1] The court of appeals erroneously stated that Brace installed four miles of plastic tubing within the Site. App., *infra*, 36a, 39a. In fact, the tubing was installed throughout the entire 140 acre homestead farm and within some neighboring farms.

[2] COE jurisdiction did not even extend to headwaters areas until, following the decision in *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975), the Corps in 1977 promulgated its final rule defining the statutory term "navigable waters" to include wetlands. 42 Fed. Reg. 37122 (1977). By then Brace had already completed cleaning the drainage ditches and was augmenting the farm's existing drainage system. The legal confusion surrounding the COE's expansive definition of "navigable waters" was not finally dispelled until this Court's decision in *United States v. Riverside Bayview Homes, Inc*, 474 U.S. 131 (1985), by which time Brace had nearly completed improving the farm and would soon begin planting row crops.

App., *infra*, 5a. By late-1986, Brace had planted rye, oats and hay on portions of the thirty acre Site.

The United States Environmental Protection Agency ("EPA") and COE became aware of Brace's activities in May 1987. Following a brief investigation, EPA and COE issued administrative orders on July 15 and 23, 1987 and May 3, 1988, alleging violations of Section 404 of the CWA and ordering Brace to cease and desist all discharge activities on the homestead farm. The administrative orders further required Brace to plug with concrete all main drainage tiles servicing the entire homestead farm and restore the areas of the farm now declared to be federally regulated wetlands to their "natural state." Brace immediately ceased all activities in the area he understood to be at issue except for mowing hay.

B. The Statutory Framework

Section 301(a) of the CWA prohibits the discharge of any pollutant into navigable waters of the United States,[3] unless the discharge is authorized by a permit. 33 U.S.C. § 1311(a). Section 404 of the CWA authorizes the Secretary of the Army, through the COE, to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) and (d).

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[3] EPA and COE have defined the term "waters of the United States" to include "wetlands." 33 C.F.R. § 328.3(b); 40 C.F.R. § 232.2(r). Prior to trial in the district court, the parties to this case stipulated as follows: "At the time of the Defendants' alleged 'discharges,' the approximately thirty-acre site that is the subject of this lawsuit was "wetlands" as defined at 33 C.F.R. § 328.3(b), and 40 C.F.R. § 232.2(r)." For the purposes of asserting his claim of exemption, Brace was willing to concede that the Site exhibited the physical characteristics which brought it within the technical definition of "wetlands" then employed by federal wetlands regulators.

Specific exemptions to the permit requirements are contained in Section 404(f) of the CWA.

Under that section, a permit is not required to discharge dredged or fill material resulting from any of six categories of activities, including farming:

> (1) [T]he discharge of dredged or fill material--
>
> (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices...
>
> (C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches...
>
> is not prohibited by or otherwise subject to regulation under this section...

33 U.S.C. § 1344(f)(1)(A).

The COE and EPA have promulgated regulations narrowly constricting the "normal farming" exemption. Under these regulations, in order to constitute "normal farming activity," the activity:

> must be part of an established (i.e., on-going) farming, silviculture and ranching operation and must be in accordance with definitions in § 323.4(a)(1)(iii).... Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.

33 C.F.R. § 323.4(a)(1)(ii).

Section 404 also contains a "recapture provision," an exception to the enumerated activities for which no permit is required in order to discharge dredged or fill material into the navigable waters. Under Section 404(f)(2),

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2).

Thus, Section 404(f) establishes a two-part test for whether a party may discharge fill material without enduring the permit application process: the party may engage in unpermitted discharge of fill material (1) so long as its activity falls within one of the six exempt categories of activity, unless (2) the activity brings the wetlands area into "a use to which it was not previously subject" and impedes the flow of navigable waters.

C. The District Court's Decision

More than three years after federal regulators issued their administrated orders, on October 4, 1990, the United States filed suit against Brace in the United States District Court for the Western District of Pennsylvania to enforce the order, alleging violations of the permit requirement section of the CWA.[4] The district court exercised it's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1345, 1355 and 33 U.S.C. § 1319 (b).

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[4] From the outset of the government's enforcement proceeding against him in 1987, Brace has asserted that his acitvities on the Brace homestead farm were exempt from federal regulation under Section 404 of the CWA. However, pre-enforcement review of CWA administrative orders is unavailable, *see South Pines Associates v. United States*, 912 F.2d 713, 717 (4th Cir. 1990); *Child v. United States*, 851 F. Supp. 1527 (D. Utah 1994); *Route 26 Land Dev. Ass'n v. United States*, 753 F. Supp. 532, 540 (D. Del. 1990), *aff'd without opinion*, 961 F.2d 1568 (3d Cir. 1992), and COE regulations preclude processing "after the fact" permit applications. *See* 33 C.F.R. 326.3(e) and App., *infra*, 8a. Moreover, EPA terminated a related administrative

Following a four day bench trial, the district court entered judgment in favor of Brace. The district court's decision was supported by, *inter alia*, the following findings of fact and conclusions of law:

- Since 1977 Defendants' activities on the site have consisted only of normal farming activities, maintenance of the existing drainage system, and activities to enhance and conserve the upland soil and water on the farm property. App., *infra*, 8a.
- [T]he subject site was during the entire period of time that ownership rested in the Brace family, an integral part of an established and on-going farm and ranching operations, and Defendants' activities during the time frame of 1985-87 did not bring a new area into the operation. App., *infra*, 9a.
- This case involves a thirty acre site that has been part of an ongoing farming operation of the Brace family for more than half a century. The land is not being converted to a use to which it was not previously subject[.] App., *infra*,16a.
- Under the exemption provisions of the CWA, the activities of Brace and Brace Farms do not require a permit because they constitute: (a) normal farming

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civil penalty action against Brace in which he claimed the agricultural exemption. App., *infra*, 7a. Therefore, Brace had no opportunity "formally" to claim the exemption until the United States initiated litigation in 1990 and the district court found his activities to be exempt in December 1993. A system that compels a farmer to wait almost ten years to have his day in court is, it is respectfully submitted, badly in need of adjustment. Ensnarling farmers in such a regulatory morass is surely not what Congress intended when enacting the normal farming activity exemption to the Section 404 permit requirements. *See* footenotes 6 and 7, *infra*.

activities; (b) upland soil and water conservation practices; and, (c) maintenance of drainage ditches. App., *infra*, 16a.

D. The Court of Appeals' Decision

The United States Court of Appeals for the Third Circuit reversed. In an opinion written by Judge Cowen, the court of appeals construed the statutory term "normal farming activities" so narrowly that, petitioners contend, it eviscerated the agricultural exemption. The court deprecated the historical and geographical context of Brace's activities, and discounted the normal practice of Erie County farmers, while overriding the contrary factual determination of the district court, in holding that Brace's activities did not constitute "normal agricultural activity." App., *infra*, 29a-38a.

The courl of appeals further determined for purposes of the CWA's "recapture" provision that Brace forfeited any agricultural exemption by virtue of his changing the use of his farm land from one type of farming (pasturing) to another type of farming (row cropping). That change, the court of appeals held, brought the Site into "a new, non-wetland use." App., *infra*, 39a. Relying exclusively upon a COE regulation providing that "[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of the waters of the United States," 33 C.F.R. § 323.4(c), the court of appeals held that even if Brace was engaged in normal farming activity, his operation was by definition "recaptured" under Section 404(f)(2) of the CWA. *Id.*

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to review the clear error of the court of appeals and to interdict the unauthorized extension of federal jurisdiction through overbroad regulations promulgated by the COE. This combination of COE overreaching and judicial misconstruction unlawfully extends the reach of the CWA into normal agricultural activities specifically shielded by Congress from the burdensome requirements of Section 404 regulation and permitting.

The issues presented in this petition are of critical importance for two reasons. First, the court of appeals' decision has grave implications for the entire American agricultural community. It generates uncertainty by counterintuitively.communicating, in direct contradiction to the agricultural exemption provided in 33 U.S.C. § 1344(f)(1)(A), that farmers who engage in normal farming activity on continuously farmed wetlands now may be subject to wetlands regulation enforcement. The court of appeals decision also threatens thousands of farm families with the direct costs and burdensome requirements of environmental regulation that Congress deliberately refrained from imposing.

Second, the court of appeals erroneously decided an important question of federal law involving significant jurisprudential issues — such as the proper extent of wetlands regulation under Section 404 and the proper application of the *Chevron* doctrine to particular COE regulations — the contours of which remain imperfectly defined.

The proper scope and extent of wetlands regulation and enforcement have been in a state of chaos since federal regulatory jurisdiction was extended to headwaters areas. The farming community should not be subject to the regulatory morass in which Brace found himself. This Court's intervention is needed to restore reason and balance in federal wetlands regulation.

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IS ERRONEOUS

A. Brace's Activities On His Farm Meet The Criteria For The "Normal Farming Activities" Exemption From Section 404's Permit Requirement

Under regulations promulgated by the COE, in order to qualify for the "normal farming activities" exemption of 33 U.S.C. § 1344(f)(1)(A), Brace must prove that his activities were "part of an established (i.e. ongoing) farming ... operation," and that they are in accordance with definitional regulations listed in 33 C.F.R. § 323.4(a)(1)(iii). 33 C.F.R. § 323.4(a)(1)(ii). He did so. App., *infra*, 9A. Brace should have

been found to qualify for the exemption because his activities (1) constituted "normal farming" and (2) continued without interruption a long history of farm activity on the Brace homestead farm in general and on the Site in particular.

1. Brace Continued An Ongoing Farming Operation

In holding that Brace's activities were not normal farming activities, the court of appeals ignored a fifty year history of constant use of and improvements to the homestead farm. During that time, the farm has been continuously used for normal farming activities such as pastureland and the growing of corn, hay, cabbage, oats and dry feed.

The record contains abundant, uncontroverted evidence (including testimony from the former County Executive Director of the Agricultural Stabilization and Conservation Service) that in the Erie County region, because soil typically requires continuous drainage in order to be suitable for cultivation, the installation and maintenance of drainage systems is an ordinary and necessary activity associated with farming. The district court considered Brace's activities in light of the history of the homestead farm, and in the context of normal farming practices in Erie County.

Disregarding specific findings of fact, the court of appeals criticized the district court for its historical and contextual approach. App., *infra*, 31a-33a. Without regard to evidence of actual Erie County farming practices, the court simply echoed the government's brief by characterizing the district court's factual finding as resting upon "a casual observation." App., *infra*, 30a.[5]

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[5] Federal Rule of Civil Procedure 52 states in pertinent part that district court "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The district court's findings of fact were based upon a full hearing and consideration of the relevant evidence as well as a full and

By focusing solely on Brace's particular activity within the thirty acres targeted by the government as wetlands, the court of appeals ignored his other agricultural activities on, and purposeful integration of the Site with, the rest of the farm. This refusal to consider Brace's Site activities within the context of his larger farming operation, and Erie County farm practice generally, arbitrarily skewed the court's analysis of the normal farming activity exemption. The more natural and rational approach would consider the functional relationship of the Site to the total mix of farming activities that regularly occur on the entire farm, given the geographical and ecological realities of Erie county. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 926 (5th Cir. 1983)("Our [judgment] is based upon the same total activities approach used by the district court. That court did not make a tract-by-tract determination of what precise activities were observed in each area of the lands involved"); *United States v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166, 1175 (D. Mass 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988)("To apply these standards, Cumberland's conduct must be analyzed by a contextual review of its 'total activities'")(quoting *Avoyelles*, 715 F.2d at 926)).

Nevertheless, even considering the thirty acre Site in isolation, it is undisputed that Brace family members pastured large farm animals on the Site for decades prior to 1977. Although pasturing cows and horses is not specifically enumerated in 33 U.S.C. § 1344(f)(1)(A) or 33 C.F.R. § 323.4(a)(1)(i) as an example of "normal farming activities," neither the government

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fair opportunity to assess the credibility of those who testified before it. The district court's decision was predicated upon clearly established facts, which even the government has not described as clearly erroneous. Consequently, the court of appeals should not have so cavalierly set aside the district court's findings of fact.

nor the court of appeals has indicated that pasturing cows and horses is not an aspect of "normal farming." Thus, at least until 1977, when Brace commenced tiling and refurbishing old drainage ditches throughout the homestead farm, the Site was indisputably part of an established, ongoing farming operation.

2. Brace Was Engaged In "Normal Farming" Activities

The narrower question, then, is whether Brace's conversion of pastureland into crop-bearing field in order to "integrate the various portions of the property into an overall operation for an effective and productive farming business," App., *infra*, 22a, constituted "normal farming activity." The court of appeals begged that question when it stated that "Brace converted a thirty-acre site that was not suitable for farming into a site that is suitable for farming, and thus 'brought an area into farming use.'" App., *infra*, 33a. Implicit in the court's holding is the proposition that Brace's work in preparation for growing row crops was itself not normal farming activity.

Brace did not bring the Site "into farming use," for it was never used for anything but farming. Before 1977, the farm including the Site was not only "suitable for farming," it was *actively farmed* by Brace family members. By working on his farm Brace did not suddenly make the Site "suitable for farming" or bring it "into farming use," for it already was farmland being farmed. Brace merely shifted from one type of farming to another type of farming. Obviously, that project could not be completed with a wink of the eye; it required work. How can and why should a farmer's diligent work to facilitate the transition from pasturing animals to growing crops be characterized as non-farming?

The court of appeals conflated the broad concept of "normal farming" with the much narrower activity of growing row crops. Growing row crops is only a subset of normal farming activity. The fact that Brace engaged in preparatory work in order to make the homestead farm suitable for the growing of row crops does not mean either that his preparatory work was non-farming or that prior to such work the Site was unsuitable for

normal farming activities. Indeed, prior to Brace's work, the Site was used for other normal farming activities, i.e., pasturing cows and horses.

The court of appeals isolated Brace's drainage activities and concluded that, standing alone, and "[r]egardless of how 'typical' or 'necessary' such activities are in Erie County, Pennsylvania, they were not "normal farming activities." That conclusion betrays common sense, for the impetus leading to the enactment of the normal farming activities exemption was the understanding that farmers frequently "dredge and discharge fill material" *as part of routine farming procedures*.[6]

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[6] The following exchange between Senators Allen and Muskie during the debates over the 1977 Amendments to the CWA illustrates that Congress specifically intended to spare the farming community from the type of wetlands regulation at issue in this case:

> MR. ALLEN. The wet crop and forest lands which are generally lowland or flood plain areas that fall under the corps 404 jurisdiction are where the exclusion of the minor drainage is needed. It serves no purpose whatsoever to exclude activities on upland or other areas that do not fall within the scope of the section 404 permit program, as the committee would seem to indicate, I trust then, that it is actually the committee's intent to exclude minor drainage activities on those lands such as I have described which are used for the production of food, fiber, and forest products. Am I correct?
>
> MR. MUSKIE. Mr. President, the drainage exemption is very clearly intended to put to rest, once and for all, the fears that permits are required for draining poor drained farm or forest land, of which millions of acres exist. No permits are required for such drainage. Permits are required only where ditches or channels are dredged in a swamp, marsh, bog, or other truly aquatic area.

4 *A Legislative History of the Clean Water Act of 1977* at 1042 (Senate Debate of August 4, 1977).

a. Corps of Engineers' Examples of Normal Farming Activities Are Not Exclusive

The court of appeals based its holding on the fact that Brace's Site activities are not "within the meaning of the statutory term 'normal farming activities' as defined by the regulations." App., *infra.*, 35a. But the regulations do not purport to be all inclusive; they are merely examples. Both 33 U.S.C. § 1344(f)(1)(A) and 33 C.F.R. § 323.4(a)(1)(i) provide that unpermitted discharge of fill material is not prohibited if it results from "[n]ormal farming, silviculture and ranching activities *such as* plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices...." (Emphasis added). Manifestly, the six enumerated activities do not constitute a comprehensive definition of normal farming activities. By using the non-restricting modifier, "such as," Congress and the COE specifically left open the possibility that other activities, such as those performed by Brace, could fall within the ambit of "normal farming." *See Equal Employment Opportunity Comm'n v. McCarthy*, 768 F.2d 1, 4 (1st Cir. 1985)(regulatory definition referring to factors "such as" those specifically enumerated "is exemplary in nature, being neither mandatory nor exclusionary"); *Stellacom, Inc. v. United States*, 24 Cl. Ct. 213, 219 (Cl. Ct. 1991)(agency's use of non-restricting modifier indicates its intent that the regulation in question be construed non-exclusively).

The court of appeals need not, and should not, have focused *only* upon the examples of normal farming activity enumerated by Congress and the agencies. By doing so, the court artificially circumscribed the concept of "normal farming" and simultaneously overrode the clear intent of Congress. The statutory exemption provides that discharging fill material is not subject to COE regulation so long as such discharge is performed in the context of normal farming activity. The court of appeals judicially erased that exemption by unreasonably and inflexibly holding that the transition from the enumerated "normal farming" activities to other, unenumerated "normal farm-

ing activities." One wonders, as many farmers must now wonder, exactly why such activity is not normal farming.

3. Brace Engaged In Normal Farming Activity On A Continual Basis

The court of appeals also held that even if Brace's father's pasturing of cows and horses constituted "normal farming activity," Brace activity lost its status as part of an ongoing farming operation when Brace commenced ditch refurbishing and drainage tiling to make the soils throughout the homestead farm suitable for producing row crops. App., *infra*, 33a. The panel based its holding on 33 C.F.R. § 323.4(a)(1)(ii), which provides, *inter alia*, that "[a]n operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations." However, neither of the conditions set forth in the regulation exist in this case.

Brace did not convert the Site to "another use," as that phrase must be understood within the context of 33 U.S.C. § 1344(f)(1). Congress' fundamental purpose in enacting the "normal farming" exemption was to afford flexibility to farmers engaged in conventional farming activities.[7] Thus, the provision of 33 C.F.R. § 323.4(a)(1)(ii) stating that "[a]n operation ceases to be established when the area on which it was con-

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[7] During the Senate debate over the 1977 Amendments to the Clean Water Act, Senator Muskie (the legislation's primary sponsor) stated:

> The upland farming, forestry and normal development activity carried primarily by individuals and as a part of family business or family farming activity need not bear the burden of an effort directed primarily at regulating the kinds of activities which interfere with the overall ecological integrity of the Nation's waters....

ducted has been converted to another use" can only reasonably refer to the conversion of an area from a farming to a non-farming use. Interpreting the regulation so that it would encompass the conversion of one farming use to another farming use on the same parcel of land does not just limit the "normal farming" exemption; it eradicates it.

Petitioners' interpretation is buttressed by the second clause of the "ceases to be established" sentence in 33 C.F.R. § 323.4(a)(1)(ii), which provides that an ongoing farming operation ceases to be "established" when the "area has lain idle so long that modifications to the hydrological regime are necessary to resume operations." Given that 33 C.F.R. § 323.4(a)(1)(ii) purports to construe the Section 404(f)(1) "normal farming" exemption, the subject pervading the regulation is farming activity. Reading the entire sentence together, it is clear that only if (1) a farming use is abandoned in favor of a non-farming use, or (2) farming use is terminated for such a long period of time that modifications to the hydrological regime are necessary to resume normal farming, then the once-exempt farming operation ceases to be "established" for purposes of the normal farming activities exemption.

Notwithstanding that Brace was unable to plant row crops until several years after he began work on the farm, it is an un-

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> The initial response to section 404 was to interpret it so as to extend its potential jurisdiction over those normal activities which would subject citizens to overregulation, and we all began to get letters protesting that potential intrusion upon their normal activities.
>
> Every proposal before this Senate, every one, is designed to exempt those normal activities from that kind of overregulation by the Corps of Engineers or anybody else.

4 *A Legislative History of the Clean Water Act of 1977* at 869, 928 (Senate Debate of August 4, 1977).

disputed fact that his work was continual and ongoing. That is, at no point did the farm or the Site lay "idle." Brace should not lose the normal farming exemption merely because he could not *immediately* convert from pasturing to growing row crops. As the record shows, Brace had limited financial resources and performed much of the work himself, accomplishing each task as he was able. App., *infra*, 4a (¶21), 5a-6a (¶28).

The panel's construction of 33 C.F.R. § 323.4(a)(1)(ii) would require farmers to assume the burdens, costs and delays of the Section 404 permit process every time they desired to convert a pasture into a field of row-crops, or even convert one type of crop into another type of crop if the conversion involved a modification to the local hydrology. This interpretation is without support in the statute or legislative history, and with good reason, for it turns the normal farming activities exemption on its head. Under the court of appeals' arbitrary and capricious interpretation, the normal farming exemption, rather than eleminating overregulation, as Congress intended, would forever limit farmers to only those farming activities and methods currently utilized, forbidding any attempt to alter or intensify those activities without first petitioning COE for a permit.

B. Brace Did Not Bring The Site Into A Use To Which It Was Not Previously Subject

In addition to proving that he qualifies under Section 404(f)(1)(A) for the normal farming activities exemption, the court of appeals concluded that Brace must establish that he was not "recaptured" by Section 404(f)(2) of the CWA, 33 U.S.C. § 1344(f))(2) (the "recapture provision"). Under the recapture provision, the exemptions enumerated in Section 404(f)(1) do not apply to any discharge of fill into wetlands "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. § 1344(f)(2).

The recapture provision substantially overlaps the COE's regulation at 33 C.F.R. § 323.4(a)(1)(ii), discussed *supra*, in

that it withdraws the normal farming exemption from activities by persons who would attempt to farm never-before farmed wetlands without first obtaining a Section 404 permit. The applicable COE regulation interpreting the "recapture provision," however, is much more aggressive than the statute it purports to implement. 33 C.F.R. § 323.4(c) provides that "[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of the waters of the United States."

The language of Section 404(f)(2) and the structure of Section 404 will not bear the construction embodied in 33 C.F.R. § 323.4(c). The recapture provision only makes sense when read as referring back to Section 404(f)(1). Thus, Section 404(f)(2) withdraws from the Section 404(f)(1) class of exempt activities those discharges which bring an area into a new use if the flow or circulation of navigable waters is impaired thereby. Two circumstances must exist before the recapture provision renders Section 404(f)(1) inapplicable. First, the otherwise exempt activity (e.g., normal farming) must be new in that the activity was not previously before practiced on the wetland at issue. Second, this new use must impair the flow or circulation of navigable waters. Unless both circumstances obtain, no permit is required under the recapture provision.

The COE, in 33 C.F.R. § 323.4(c), simply collapses the "activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject" provision into the "where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced" provision. The statutory test for recapture ("new use plus impairment of water flow") is reduced by the Corps' regulation into simply "impairment of water flow," which, if found, is neatly deemed to satisfy the new use requirement.

The COEs' interpretation of the recapture provision is neither reasonable nor authorized by Congress. If Congress had intended the recapture provision to render the enumerated exemptions inapplicable whenever the flow of navigable waters is impaired, it could have so provided. Instead, Congress created a two-pronged recapture provision. The COE should not be

permitted unilaterally to expand its jurisdiction by simply pretending the first prong (the new use requirement) does not exist.

The correct application of the recapture provision is illustrated in many prominent Section 404 cases, including several cited by the court of appeals. *See Conant v. United States*, 786 F.2d 1008 (11th Cir. 1986) *United States v. Huebner*, 752 F.2d 1235 (7th Cir. 1985); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *Environmental Defense Fund v. Tidwell*, 837 F. Supp. 1344 (E.D. N.C. 1992). In each of these cases, the landowner acquired land which had not previously[8] been farmed and attempted to convert wetlands into non-wetlands before commencing normal farming activities. The courts in these cases appropriately rejected the landowners' claims of exemption because in each case the landowner would have had to convert the property into non-wetlands before commencing (for the first time on that property) farm activity. The combination of such new uses and concomitant impairment of water flow is exactly what Section 404(f)(2) was intended to prevent.

By contrast, *Brace* is a pure agricultural exemption case. Brace converted the Site from wetland into nonwetland, but not for the purpose of establishing a new (farming) use. As discussed above, Brace simply switched from one type of farming to another type of farming. That is precisely the type of normal farming activity Congress exempted from the Section 404 permit process, even if the flow of navigable waters is impaired in the process.

As such, the instant case is distinguishable from the cases relied upon by the court of appeals in support of its decision. In *United States v. Larkins*, 657 F. Supp. 76 (W.D. Ky. 1987), *aff'd*, 852 F.2d 189 (6th Cir. 1989), the defendant landowners acquired 550 acres of flood plain property in 1976. The land,

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[8] In *United States v. Huebner*, 752 F. 2d 1235 (7th Cir. 1985), the subject property had not been farmed in decades.

parts of which was covered with knee deep water, had either never been farmed, or, at best, had not been farmed since 1950 when the State reintroduced beavers into the area. Although there was a complete absence of evidence of farming activity at any time, the landowner defendants unsuccessfully attempted to claim both the farming and silviculture exemptions.

In *Bayou Marcus Livestock & Agricultural Co. v. U.S. Environmental Protection Agency*, No. 88-30275, 1989 WL 206151 (N.D. Fla. Nov. 3, 1989), the plaintiff landowners acquired wetlands in 1985. Prior to 1971, the subject property was used, "if at all," for turpentine collection. Some tree harvesting by unknown persons occurred between 1971 and 1974. There was no evidence of any related activity on the land between 1974 and 1985. Upon acquiring the property, plaintiffs began digging ditches, removing trees and constructing roads, allegedly to prepare the site for tree farming. The court correctly rejected plaintiff's claimed farming/silviculture exemption for the obvious reason that their operation was not part of an ongoing farming or silviculture operation; rather, it was an attempt to establish, for the first time and by modifying the hydrology of the wetlands, a tree farm.

Brace is similarly distinguishable from the agricultural exemption cases commonly cited as authority unfavorable to landowners claiming the normal farming exemption. *See Conant v. United States*, 786 F.2d 1008 (11th Cir. 1986)(new construction of a fish farm not exempt because plaintiff's activity was not part of an established farming operation); *United States v. Huebner*, 752 F.2d 1235, *cert. denied*, 474 U.S. 817 (1985)(landowners attempted to expand existing farm by growing upland crops on *previously unfarmed* wetlands); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983)(plaintiffs drained 20,000 acres of wetlands in order grow soybeans on *previously unfarmed* land); *United States v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166 (D. Mass 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987)(landowners dredged 2,000 acre swamp for conversion to agriculture, a use to which the site was never before subject). These cases uni-

formly involve a landowner's conversion of wetlands into nonwetlands in order to bring previously unfarmed wetlands into agricultural use for the first time. Brace's conversion occurred on wetlands that were actively being, and had long been, used for normal farming activities.

The mischief worked by COE's regulatory overreaching can be seen in *United States v. Akers*, 785 F.2d 814, *cert. denied*, 479 U.S. 828 (1986). That case involved a farmer's construction of a two-mile long dike in connection with the drainage of nearly three thousand wetland acres known as the "Big Swamp." Despite the substantial factual dissimilarity between *Akers* and the instant case in terms of the sheer scale of operations,[9] the cases are legally similar in that *Akers* also involved property that had long been subject to normal farming activity. Yet the *Akers* court laid the groundwork for the Third Circuit's erroneous decision by arbitrarily holding that while changes from one wetland crop to another are not subject to the permit requirement, changes from a wetland farm activity to a nonwetland farm activity are subject to the COE permit program. *Id.* at 820. That distinction cannot be derived from the Clean Water Act. As discussed *supra*, the normal farming exemption is unavailable only to persons who would introduce farming for the first time (new use), *not* farmers who introduce a new type or method of farming on previously farmed land. The artificial distinction between wetland farming and nonwetland farming drawn by the Ninth and now the Third Circuit lacks textual and structural support in the CWA.

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[9] The court of appeals stated that the size of wetlands affected by farming activity is irrelevant to the scope of regulatory jurisdiction. App., *infra*, 34a-35a. Yet, as the *Akers* court noted, "It is ... the *substantiality* of the impact on the wetland that must be considered in evaluating the reach of [the recapture provision]." *United States v. Akers*, 785 F.2d at 822 (emphasis added).

By characterizing all conversions of wetland into nonwetland as a statutory "change in use," COE arbitrarily detached the recapture provision from the exemptions enumerated in Section 404(f)(1). But once the focus shifts from real-life changes in use accompanied by an impairment of the flow of navigable waters (Section 404(f)(2)) to *any* activity resulting in the conversion of wetlands into nonwetlands (33 C.F.R. § 323.4(c)) the regulatory jurisdiction of the COE dramatically expands beyond the bounds established by Congress.

The COE's regulation is not an exercise in legislative gap filling, for Congress unambiguously expressed its intent. The recapture provision does not remove active and ongoing farming operations from the exemption. Rather, by its own terms, the provision only reaches attempts to switch from non-exempt uses to exempt uses, where such attempts impair the flow of navigable waters. There is no ambiguity, and therefore no delegation of authority which would authorize the COE to expansively "elucidate" the recapture provision. The COE's regulation is thus a usurpation of legislative authority to which judicial deference is not required under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 838 (1984). *See, e.g., Pittston Coal Group v. Sebben*, 488 U.S. 104 (1988). Accordingly, based on the foregoing, this Court should grant certiorari to ensure that Congress' comprehensive and carefully crafted federal wetlands policy applicable to farmland and normal farming activities is not upset by regulatory overreaching and the court of appeals' erroneous decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1995

APPENDIX

BEST AVAILABLE COPY

Filed December 17, 1993

UNITED STATES OF AMERICA
Plaintiff

v.

ROBERT BRACE and
ROBERT BRACE FARMS, INC.,
a Pennsylvania Corporation,
Defendants

Civil Action No. 90-229 Erie

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ADJUDICATION

The above-captioned case was tried non-jury and a view of the site in dispute was conducted by the Court. The Court makes the following

FINDINGS OF FACT

1. The United States has brought this action against Robert Brace, individually (hereinafter "Brace") and Robert Brace Farms, Inc., a Pennsylvania corporation (hereinafter "Brace Farms") (collectively, "Defendants"), alleging two counts of violations of the Clean Water Act (hereinafter "CWA").

2. Brace is a farmer who owns land in Erie County that is used exclusively for farmland. Brace Farms, Inc. is a Pennsylvania corporation engaged principally in the farming business.

3. Defendants own approximately 600 acres of real property located in Erie County, Pennsylvania, approximately 30 acres of which is the subject of the action ("site").

4. The parties have stipulated that the site constitutes "wetlands" as defined in the CWA and its implementing regulations. The Court's view indicated that not more than 25% of the site met the definition.

5. Wetlands constitute a productive and valuable resource, the unnecessary alteration or destruction of which constitutes a serious violation of the environmental laws, which should be discouraged as contrary to the public interest.

6. Wetlands perform vital functions important to the environment and public interest, including but not limited to: (a) serving water purification and water quality enhancement functions; (b) serving as storage areas for storm and flood waters; (c) serving natural biologic functions, including food chain production, general habitat, and resting sites for aquatic or land species, and (d) serving erosion and sedimentation control functions. 33 C.F.R. 320.4(b); 40 C.F.R. 230.41.

7. The site is adjacent to a tributary of Elk Creek, which is an interstate waterway.

8. Elk Creek is a tributary of Lake Erie, which is also an interstate waterway.

9. Brace's parents and other family members have always earned their principal livelihood from farming activities. While Brace was growing up, he lived on property that now includes the site. Brace has been a farmer since the age of fifteen.

10. Brace purchased certain farm property from his father in 1975. A portion of that property contains the site. The property has been in the Brace family since the 1930's, when Brace's grandfather farmed the land.

11. In years prior to the time that Brace's father owned the property that includes the site, the property had been used regularly for normal farming activities, such as cropland and pastureland for diary and beef cattle.

12. Brace's parents were in the farming business for their entire lives. Brace's father had used the site for normal farming activities during the time he owned the property. From time to time, Brace's father produced corn, hay, cabbage, oats and dry feed on the property that includes the site.

13. The soil in Erie County requires continuous draining in order to be suitable for cultivation. Extensive underground drainage systems are typical and necessary aspects of farming in Erie County, and the installation of such systems is a normal farming activity in order to make land suitable for farming.

14. The topography and soil type on the site are typical of Western Pennsylvania and of Erie County in particular. Beavers have traditionally lived on and around the site. Due to the presence of beaver dams that have affected the flow of water on the site, the site was traditionally inundated with water at various times.

15. The wildlife on the site consists of transient deer, geese, rabbits and other wildlife typical of the area and not uncommon to farmland in Erie County. The site does not serve as a wildlife refuge. The wildlife on the site has not changed from the time that Brace's father owned the land up to the present time.

16. Brace purchased the property from his father with the intent to continue and to improve upon his father's established farming operation. It was Brace's intent to integrate the various farmable portions of the property into an overall operation for an effective and productive farming business.

17. At the time Brace purchased the property containing the site from his father, the site was vegetated with areas of scrub brush, including red brush and briars. From 1977 to 1987, as a result of the work that Brace did in the late 1970's, the site was basically dry except in times of excessive precipitation, when under such circumstances, the site, like all other land in the area, would show evidence of a heavy rain.

18. From 1985 through 1987, the site was not used for either pasturing or growing of crops.

19. At the time Brace acquired the property in 1975, Brace's father had made the decision to use the site for pastureland due to the costs associated with other aspects of farming and limited available funds. Upon the purchase of the property, Brace leased the property to his brother, who continued the dairy practices for approximately one year and then removed the fencing used for pastureland and cleared portions of the pasture brush. The topography and water conditions of the site did not change during the time that Brace's brother leased the site.

20. Sometime subsequent to the purchase of the property from his father, Brace purchased an additional, adjacent 140 acres from his cousins that had the effect of increasing the total acreage to be used for Brace's overall and integrated farming plan to approximately 270 acres.

21. Due to the purchases of property from Brace's father and cousins, Defendants were highly leveraged in the late 1970's and the 1980's. At times, Defendants' service debt and operating expenses ranged from $500,000 to $700,000, the size of which affected the Brace's ability to do all of their work in one year; however, they were regularly doing something on the property.

22. In the late 1970's Brace developed gas wells on portions of the property he owns. No wells were developed on the site. Brace invested in the gas wells in order to help subsidize his farming operations over the years.

23. From 1975 to 1977, Brace began to make plans for the farming of his property. In 1977, Brace decided to seek the advice and assistance of the Agricultural Stabilization and Conservation Service (hereinafter "ASCS") as part of his land to develop an integrated farming operation on the property that includes the site. Brace's father had previously worked with the ASCS to prepare a drainage plan relating to the site for the purpose of farming the entire property. At the time he purchased the property for his father, Brace obtained the soil and conservation plans that had been prepared for his father by the ASCS

office in Erie County. The plan contains a map of the property and the layout of the drainage system on the property, including portions of the site. The plans were issued in the 1960's.

24. Brace utilized the existing drainage plan that had been implemented on the property that contains the site as part of his overall intention and design to establish a farming operation that would be interconnected and continuous throughout the property. The drainage system impacts the ability to produce crops on all parts of Brace's property; without such a system, the property is not suitable for farming because of soil conditions.

25. The existing drainage system was in poor condition and not yet complete at the time of Brace's acquisition. Therefore, in order to maintain, preserve and improve upon the existing system consistent with his farming plans, Brace began cleaning the system in 1976 in order to make it effective for agricultural development.

26. The drainage system included a design for channels and tiling to allow waters from adjoining croplands to be siphoned off and onto the site. In late 1976 and early 1977, Defendants implemented the first stage of the interconnected plan that had been recommended by the ASCS by reopening a channel to allow the water to flow in the natural direction. Defendants also installed tiling material on the site consistent with the ASCS recommendations.

27. Also, in 1977 Brace contacted the ASCS to inquire as to technical assistance and cost-sharing arrangements that might be available for the implementation of his plans. The ASCS visited the site prior to extending such assistance and thereafter provided such advice and assistance to Brace, continuing to do so up to 1985. The site and the farming activities conducted thereon were never concealed from the Plaintiff, other departments of the federal government or state agencies.

28. As of 1977, the essential portions of Brace's improvements to the already existing drainage system on the site were intact and operating. In subsequent years, Brace maintained the

system, consistent with his overall plans and as is necessary for typical framing activities in Erie County, as time, funds and equipment were available. If all of the necessary funds had been available to him in 1977, Brace would have expedited his farming plans and completed the project at that time.

29. The maintenance of the drainage system that Brace performed on the site from 1977 to 1979 enhanced Brace's farming productivity in the upland areas and was necessary to conserve the soil and water conditions in those areas.

30. From 1977 to 1979, Defendants continued to maintain the drainage system by cleaning it and removing sedimentation to enhance water flow. The site was dry at the end of 1979 as a result of such maintenance, with the exception of times of excessive rainfall when it, like areas located off site, would become wet.

31. In the late 1970's and early 1980's, as part of the maintenance of the drainage system, Brace introduced a series of small channels that were connected to the initial channel and were part and parcel of the initial work. The small channels enhanced the flow of surface water off of the uplands to its natural courses.

32. Defendants' work in improving upon the interconnected drainage system progressed continuously from 1977 to 1987. Brace worked on the system when funds, time and equipment were available. Brace's wife, two sons and a hired worker assisted in the farming activities, and Brace regularly worked the site.

33. From 1985 through 1987, Brace cleared, mulched, churned, levelled and drained the formerly wooded and vegetated site.

34. In 1986 and 1987, Brace Farms paid for excavation in the site and the burying of plastic tubing, sometimes referred to as "drainage tile," in an effort to drain the site.

35. Throughout the 1980's, in order to continue to improve upon the drainage system that began in 1977, Brace used appropriate equipment to remove unconsolidated soil, pebbles,

silt and growth which were impeding water flow and tied certain lateral channels to the existing system to further enhance water flow. These activities were part of the overall maintenance of the drainage system, and farmers in the Erie County area typically engage in such practices.

36. Defendants did not have a permit issued pursuant to CWA section 404 authorizing their activities.

37. As a result of Defendants' levelling, spreading and tiling, Defendants began to grow crops on the site in 1986 and 1987.

38. Since 1977, Defendants have planted and harvested cabbage, oats, hay and other grains on portions of the property. In 1986, Defendants planted oats and alfalfa hay on portions of the site because Brace believed that it was the proper time to do so.

39. The United States became aware of Defendants' activities in 1987.

40. Between 1987 and 1988, the United States issued three orders to Defendants, ordering them, *inter alia*, to refrain from further disturbances of the site, so that the site could naturally revegetate with indigenous plant species.

41. After the issuance of these orders, Defendants continued to mow the vegetation on the site.

42. In October 1988, Brace received an Administrative Complaint in connection with his farming activities on the site. Brace, as he was advised he could do, requested a hearing to contest the Complaint, believing that his activities were exempt from any and all permit requirements. Prior to the hearing, the Complaint was dismissed.

43. In the summer of 1988, Brace approached the ASCS in order to gain the status of "commenced conversion from wetlands" with respect to the site for purposes of the Federal Food Security Act. The ASCS granted this status to the site, finding that Brace's on-going farming activities had commenced prior to December 1985.

44. In April 1990, as a cautionary measure, Brace approached the Army Corps of Engineers (hereinafter "COE") in an effort to obtain an after-the-fact permit to conduct his farming activities on the site, despite his belief that the activities were and are exempt from permit requirements of the CWA. The United States Environmental Protection Agency (hereinafter "EPA") requested that COE not review an application from Brace for an after-the-fact permit. However, Brace was advised that because the matter was then in litigation, the government would not positively act on his request for a permit.

45. Since 1977 Defendants' activities on the site have consisted only of normal farming activities, maintenance of the existing drainage system, and activities to enhance and conserve the upland soil and water on the farm property. Since the time of the cease and desist order, Brace has terminated all farming activity on the site, with the exception of routinely cutting the hay. Brace has not disturbed the soil on the site in any significant or meaningful way since being served with the cease and desist order. Brace has continued to farm the adjacent areas but has not achieved the full benefit of the overall integrated plan that he hoped to accomplish due to his present inability to continue his farming activities on the site.

DISCUSSION

This litigation involves a 30-acre area located in Waterford Township, Erie County, Pennsylvania. The parties entered into a pretrial stipulation that the 30-acre site was wetlands as defined at 33 C.F.R. § 328.3(b), and 40 C.F.R. § 232.2(r). This Court accepts this stipulation for purposes of this lawsuit but notes that our view of the site indicated that only approximately 25% of the site would fall within the aforementioned definition of wetlands.

The property in question has been owned by the defendant, Robert Brace, since 1975 when he purchased it from his father, Charles Brace. Charles Brace acquired the land in the early 1950's, having bought the adjoining lands from his father, Leslie Brace, who had owned the land since the 1930's.

We perceive this case as simply calling for a determination of whether or not the Defendants' activities on their farm lands entitled them to an exemption from the permit requirements of the CWA, 33 U.S.C. §§ 1251-1387, as normal agricultural activities.

33 U.S.C. § 1344(c)(1)(A) provides a narrow exemption to the general requirement of a Section 404 permit. *See* 33 U.S.C. § 1344. This exemption defines as non-prohibited discharge of dredged or fill material that which is incident to "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices."

At the center of this statutory dispute is the subquestion of whether or not Defendants' activities over the years on the site were part of an effort to establish a new crop production operation or a part of the long history of various agricultural practices and uses consistent with those utilized by farmers in Erie County, Pennsylvania.

This Court is persuaded and concludes that the subject site was during the entire period of time that ownership rested in the Brace family, an integral part of an established and on-going farm and ranching operations, and Defendants' activities during the time frame of 1985-1987 did not bring a new area into the operation. A key factor in reaching this conclusion is this court's realization that the site was an integral part of the drainage system previously installed in adjoining crop producing fields. Defendants planted and harvested oats and other crops from the site area and that during the period of 1975 through 1987, they cleared brush and cropped hay from the site.

What comprises "normal agricultural activities" is fact specific and this Court herein makes findings of fact (Findings of Fact Nos. 16, 19, 20, 23, 24, 28 and 58) that the Defendants were engaged in normal agricultural activities on the site. (See Conclusions of Law No. 32).

We conclude that the land which can be traced to Robert

Brace's grandfather, Leslie, in the 1930's has been in continuous use for what would be a normal farming operation in Erie County, Pennsylvania. As we wrote in this Court's Opinion, addressing the parties' Motions for Partial Summary Judgment, "[t]his certainly does not appear to be the type of case where a corporation or large farming enterprise takes control of a parcel of land and dramatically alters the composition of the land and runs roughshod over the requirements of the Clean Water Act." *See, United States v. Akers, 785 F.2d 814 (9th Cir. 1986) (2,889 acres of wetlands); and United States v. Cumberland Farms of Connecticut,* 647 F. Supp. 1166 (D. Mass. 1986) (2,000 acres of wetlands). Here the parcel of land in question has remained within the same family for over 60 years and there has existed a plan to over a period of time, with the financial help and guidance of United States Department of Agricultural programs, to place the entire farm to productive farm usage. This plan and the Defendants' efforts to reach its goal, as financing permitted, was not directed to converting in the mid 1980's a regulation defined wetland area to a new crop production area.

Likewise, this Court finds that the Defendants' activities on the site constituted an integral part of long-range upland soil and water conservation practices. The farming activities on the site were designed to enhance productivity in the upland areas by allowing water to flow to its natural courses with a consequential improvement of the soil. Such courses of action, together with regularly cleaning of the drainage system on the site, constituted maintenance of the drainage system on the site, constituted maintenance of the drainage system, and as such, is exempt from the permit requirements of the CWA. 33 U.S.C § 1344(f)(1)(c).

The Government also argues that the Defendants have not shown that they can avoid the recapture provision of section 404 (f)(2) of CWA. Since this Court, as the factfinder, concludes that the Defendants' activities were not conducted in order to bring the site property into a use to which it was not

previously subject, but rather were part of an ongoing farming operation of the Brace family for some 60 years and did not impair the flow or circulation of navigable waters or the reduction of the reach of such waters, it follows that the recapture provision does not apply to this case. A similar result is reached relative to the maintenance of a drainage ditch since such maintenance would not convert wetlands to a use to which the site area was not previously subject.

Now we address what for the Court is the most difficult aspect of this case, namely, that the Defendants failed to totally comply with Administrative Orders issued to them, requiring them to cease and desist all activities on the site. Although the Defendants continued only to routinely cut the hay on the site, their general response to the Administrative Orders were to request a hearing, seek the status under ASCS of a prior 1985 "commenced conversion from Wetlands" and contact the COE in an effort to obtain an after-the-fact permit to conduct farming activities on the site.

However, since the Defendants have not disturbed the soil on the site in any significant way since being served with the cease and desist orders, and in the view of this Court acted only out of sincere conviction, although undoubtedly misguided, we will not hold the Defendants liable in this litigation for being in contempt or non-compliance with said Administrative Orders.

This Court finds the Defendants not liable for violations of the Clean Water Act because we conclude that they are entitled to the exemptions allowed by Section 404(f)(1)(A) of the Act and for the other reasons set forth herein we find all liability issues in favor of the Defendants.

An appropriate order will be filed.

CONCLUSIONS OF LAW

1. This Court has jurisdiction under CWA § 309(b), 33 U.S.C. § 1319(b) to grant injunctive relief and impose civil penalties with respect to violations of the CWA.

2. Under CWA § 309(b). 33 U.S.C. § 1319(b), this Court is empowered to order permanent injunctive relief enjoining all future violations of the CWA at a site.

3. The CWA was passed to restore and maintain the chemical, physical, and biological well-being of the Nation's waters. Section 301(a) makes it unlawful for a person to discharge pollutants into "waters of the United States" except as in compliance with other provisions of the Water Act. One of those sections is § 404, which requires a permit from the COE for the discharge of dredged or fill material into waters of the United States, including wetlands. 33 U.S.C. § 1311, 1344.

4. "Wetlands" are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. 33 C.F.R. § 328.3(d). To be a wetland an area must be inundated or saturated by surface or ground water for long enough periods of time so that plants that are adapted to wet conditions or that can live in saturated soils are dominant plant species in that area. The term "prevalence of vegetation" refers to vegetation that is dominant in an area or that covers most of a given area under normal circumstances. Normal circumstances simply means the condition of an area when undisturbed by man.

5. The parties have stipulated, and this Court concludes, that the site constituted wetlands at the time of Defendants' activities.

6. The term "waters of the United States" means all waters which are currently used, or were used in the past, or may be susceptible to use in interstate commerce, including all wet-

lands which are adjacent, neighboring or bordering to tributaries of waters which are or may be used in interstate commerce. In addition, a wetland is "waters of the United States" if the use, degradation or destruction of it could effect waters which are or could be used by interstate of foreign travelers for recreational or other purposes, or from which fish or shellfish are or could be taken and sold in interstate or foreign commerce. "Waters of the United States" are also tributaries of the waters described above. Wetlands adjacent to any of these waters are also waters. The term "adjacent" means bordering, contiguous, or neighboring. 33 C.F.R. § 328.3(a).

7. The Court concludes that the site constituted waters of the United States at the time of Defendants' activities.

8. The term "pollutant" is broadly defined in the Clean Water Act to include "dredged spoil, solid waste, . . . rock, sand, . . . biological materials, . . . and agricultural waste discharged into water." 33 U.S.C. § 1362.

9. Dredged or fill material consisting of "dredged spoil, solid waste, . . . rock, sand, . . . biological materials, . . . and agricultural waste" constitutes a "pollutant" within the statutory definition. 33 U.S.C. § 1362.

10. "Fill material" means "any material which replaces portions of the waters of the United States with dry land or which changes the bottom elevation of a waterbody for any purpose." 40 C.F.R. § 232(i).

11. Defendants' clearing, churning, mulching, levelling, grading, and landclearing of the formerly wooded and vegetated site was a discharge of dredged spoil, biological material, rock and/or sand, each of which is defined as a pollutant by the CWA, which change the bottom elevation of the site.

12. Despite the prohibition against discharge of pollutants under the CWA, a person may obtain a permit for the discharge of any pollutant upon meeting certain applicable requirements of the CWA. 33 U.S.C. § 1342.

13. The CWA contains explicit exemptions from the permit requirements. Specifically, a permit is not necessary for the

"discharge of dredged or fill material (a) from normal farming, silviculture and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices," . . . or (c) "for the purpose of . . . maintenance of drainage ditches, . . . 33 U.S.C. § 1344(f)(1)(A), (C).

14. A permit is not required for an activity that would not "destroy or degrade" waters of the United States because it would have only a *de minimus* effect on such waters. The discharger bears the burden of demonstrating that its activity will not destroy or degrade waters of the United States. 33 C.F.R. § 232.2, *as amended.*

15. For purposes of the regulations dealing with exemptions, "an activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States." 33 C.F.R. § 232.2, *as amended.*

16. For purposes of the regulations dealing with exemptions, "an activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a de minimus (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function." 33 C.F.R. § 232.2, *as amended.*

17. In order to qualify for the exemption from the permit requirements for "normal farming," 33 U.S.C. § 1344(f)(1)(A) the activities at issue "must be part of an established (i.e., ongoing) farming, silviculture or ranching operation." 33 C.F.R. § 323.4(a)(1)(i).

18. This case is not the type of case where a corporation or large farming enterprise takes control of a parcel of land and dramatically alters the composition of the land and runs roughshod over the requirements of the Clean Water Act. It is a case of a legitimate factual dispute regarding the use of a parcel of land that has remained within the same family for over half of a century.

19. The determination of "normal agricultural activities" is a "fact specific" inquiry.

20. The existence of "normal farming" activity turns on an analysis of whether farming activities are "established and continuing."

21. Normal farming activities within the exemptions from the permit requirements of the CWA connote and establish a "continuing activity." They are activities that occur on a continuing basis as part of an ongoing farming or forestry operation.

22. The normal farming exemption will apply where land has been subjected to an established upland farming operation.

23. Section 404(f)(1)(C) of the CWA, 33 U.S.C. § 1344(f)(1)(C), "specifically provides that dredge or fill discharges for the purpose of maintenance (but not construction) of drainage ditches are exempt" from the permit requirements.

24. "Maintenance of a drainage ditch" means "the physical preservation of the original, as-built configuration of the ditch. Maintenance includes the removal of accumulated sediment and debris."

25. Unlike the farming activity exemption found in Section 404(f)(1)(A), 33 U.S.C. § 1344(f)(1)(A), there is no "ongoing" requirement associated with the "maintenance of a drainage ditch" exemption. Maintenance must be interpreted in the context of an "as needed basis," and there is no requirement in the CWA that it must be carried out in a precise or specified way.

26. Notwithstanding the exemptions from the permit requirements, under the "recapture provision" of the CWA, 33 U.S.C. § 1344(f)(2), certain activities do require a permit. Specifically, a permit will be required where "discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced. 33 U.S.C. § 1344(f)(2).

27. In order to prevail on a claim there the recapture provision applies in this case, two elements must be established. First, it must be established that Brace's activities were conducted in order to bring the property into a use to which it was not previously subject. Second, if this element is established, it must then be established that Brace's activities will impair the flow or circulation of navigable waters or will reduce the reach of such waters. Both elements must be satisfied in order for the recapture provision to apply. The Court finds that neither element has been proven in this case.

28. The recapture provisions of the CWA clearly apply only to an area of navigable waters that is brought "into a use to which it was not previously subject." 33 U.S.C. § 1344(f)(2).

29. For the purposes of determining whether a discharge associated with the "maintenance of a drainage ditch" is recaptured under Section 404(f)(2), 33 U.S.C. § 1344(f)(2), it is necessary to determine whether such maintenance activities would convert wetlands to a use to which the area was not previously subject.

30. This case involves a thirty-acre site that has been part of an ongoing farming operation of the Brace family for more than half a century. The land is not being converted to a use to which it was not previously subject, nor has significant impairment to the reach or flow of waters been proven. Accordingly, the Court finds that the recapture provision does not apply to this case.

31. Defendants' activities in commencing conversion of the site prior to December 23, 1985, and in obtaining status as "commenced conversion" from the ASCS are evidence that Brace and Brace Farms have established an ongoing farming operation on the site.

32. Under the exemption provisions of the CWA, the activities of Brace and Brace Farms do not require a permit because they constitute: (a) normal farming activities; (b) upland soil and water conservation practices; and, (c) maintenance of drainage ditches.

33. Brace has testified that his farming activities on the site enhanced productivity in the upland areas due to improvements in water flow, by which water flowed to its natural courses, and the corresponding improvements to the soil. The Court finds that Brace's activities on the site constitute upland soil and water conservation practices and are thereby exempt from the permit requirements.

34. Based upon the testimony and documentary evidence of Defendants' conduct in preserving and regularly cleaning the existing drainage system on the site, the Court finds that such conduct constitutes maintenance of the drainage system, and as such, is exempt from the permit requirements of the CWA.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
Plaintiff

v.

ROBERT BRACE and
ROBERT BRACE FARMS, INC.,
a Pennsylvania Corporation,
Defendants

Civil Action No. 90-229 Erie

ORDER

AND NOW, this _____ day of December, 1993, after a non-jury trial bifurcated as to liability and upon Findings of Fact, Conclusions of Law and reasons set forth in the accompanying Adjudication,

IT IS HEREBY ORDERED that Judgment is entered in favor of the Defendants, Robert Brace and Robert Brace Farms, Inc., a Pennsylvania Corporation, and against the Plaintiff, United States of America.

_____

United States District Judge

Filed November 22, 1994

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-3076

UNITED STATES OF AMERICA,
Appellant.

v.

ROBERT BRACE; ROBERT BRACE FARMS, INC.,
a Pennsylvania corporation,

On appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 90-cv-00229E)

PETITION FOR A WRIT OF CERTIORARI

Argued September 19, 1994

Before: BECKER and COWEN, Circuit Judges

and POLLAK*, District Judge

(Filed: November 22, 1994)

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*Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

COWEN, Circuit Judge.

The United States brought this action in the United States District Court for the Western District of Pennsylvania against Robert Brace, individually, and Robert Brace Farms, Inc., a Pennsylvania corporation (collectively, "Brace" or "defendants"), alleging violations of the requirement in Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, that a permit be obtained for the discharge of dredged or fill material into waters of the United States. The United States sought restoration of the site, a permanent injunction and civil penalties pursuant to 33 U.S.C. § 1319(d).

The district court bifurcated the action: a trial on liability issues and a trial on remedy issues. Shortly before the liability trial, Brace stipulated that at the time of the discharges, "the approximately thirty-acre site that is the subject of this lawsuit was wetlands as defined at 33 C.F.R. § 328.3(b) and 40 C.F.R. § 232.2(r)." Pre-Trial Stipulation (Dec. 16, 1993); Appendix ("App.") at 40.

The United States, either by stipulation or at trial, established the five elements of a prima facie case for violations of Section 404 of the CWA: (1) defendants admitted that they are "persons" within the meaning of the CWA; (2) defendants admitted that the activities at the site were conducted without a permit; (3) defendants stipulated that the site was a wetland at the time of the discharges; (4) the district court held that the site constituted waters of the United States at the time of defendants' activities; and (5) the district court held that defendant's clearing, mulching, churning, and levelling of the formerly wooded and vegetated site constituted a discharge of pollutants into the waters of the United States and that defendants paid for excavation and installation of drainage tubing in an effort to drain the site.

Brace asserted, and the district court held, that the discharges were exempt from the permit requirement under Section 404(f)(1). The court concluded that: (1) Brace's activities on the wetland constituted "normal farming activities" exempt under Section 404(f)(1)(A); and (2) Brace's activities constituted "upland soil and water conservation practices" also exempt under that same provision of the CWA. *United States v. Brace*, C.A. No. 90-229 (W.D. Pa. Dec. 16, 1993), slip op. at 22-23. In addition, the court found that Brace's conduct in "preserving and regularly cleaning the existing drainage system on the site" was exempt from the permit requirement as "maintenance of the drainage system" under Section 404(f)(1)(C). *Id.* at 23. The court also held that the recapture provision of Section 404(f)(2) does not apply to this case because "[t]he land is not being converted to a use to which it was not previously subject, nor has significant impairment to the reach or flow of waters been proven." *Id.* at 22.

The district court entered judgment in defendants' favor. We hold that the district court incorrectly applied the requirements of the CWA permit exemption provisions. We will reverse the order of the district court and remand the case to determine the appropriate remedy.

I.

Brace is a farmer who owns approximately 600 acres of real property in Erie County, Pennsylvania, including the subject thirty-acre wetland site ("the site"). Brace Farms, Inc. is a Pennsylvania corporation engaged principally in the farming business. Brace's parents and other family members have always earned their principal livelihood from farming activities. Brace purchased a parcel of farm property from his father in 1975. A portion of that property contains the site. The property has been in the Brace family since the 1930's when Brace's grandfather farmed the land. Prior to 1975, Brace's father used the site for pasturing of cows and horses, and Brace's brother used the site for pasturing cows until 1976.

Brace purchased the property from his father with the intent of continuing and improving his father's established farming operation. It was Brace's intention to integrate the various portions of the property into an overall operation for an effective and productive farming business. At the time Brace purchased the property containing the site from his father, the site was vegetated with areas of scrub brush, including red brush and briars.

In 1977, Brace sought the advice and assistance of the Agricultural Stabilization and Conservation Service ("ASCS") as part of his plan to develop an integrated farming operation on the property that includes the site. The ASCS is "an agency of the United States Department of Agriculture which is generally responsible for administering commodity production adjustment and certain conservation programs of the Department." 7 C.F.R. § 12.2(a)(2) (1994). Brace's father had previously worked with the ASCS to prepare a drainage plan relating to the site for the purpose of farming the entire property. At the time he purchased the property from his father, Brace obtained and utilized the soil and conservation plans that had been prepared for his father by the ASCS. The drainage system impacts the ability to produce crops on all parts of Brace's property.

The existing drainage system was in poor condition and not yet complete at the time of Brace's acquisition. Brace began cleaning the system in 1976 in order to improve upon the existing system and make it effective for agricultural development. In the following years, Brace maintained and improved the drainage system pursuant to the plan recommended by the ASCS. From 1977 to 1985 the ASCS periodically visited the site and provided technical assistance and cost-sharing arrangements to Brace.

As of 1977, the essential portions of Brace's improvements to the existing drainage system were intact and operating. Brace's work in improving upon the interconnected drainage system progressed continuously from 1977 to 1987, as time, funds and equipment were available. If the necessary funds had

been available to him in 1977, Brace would have expedited his farming plans and completed the project at that time. As a result of Brace's efforts, by the end of 1979 the site was dry, with the exception of times of excessive rainfall.

Brace cleared, mulched, churned, levelled, and drained the formerly wooded and vegetated site from 1985 through 1987. In 1986 and 1987, Brace paid for excavation in the site and the burying of plastic tubing or "drainage tile" in an effort to drain the site. Throughout the 1980's, Brace used appropriate equipment to remove unconsolidated soil, pebbles, silt, and growth which were impeding water flow. Farmers in the area typically engaged in such practices.

As a result of Brace's levelling, spreading, and tiling, Brace began to grow crops on the site in 1986 and 1987. Brace did not have a permit issued pursuant to Section 404 of the CWA authorizing his activities.

The United States became aware of Brace's activities in 1987. During 1987 and 1988, the United States issued three orders to Brace, directing him, *inter alia*, to refrain from further disturbing the site, so that it could naturally revegetate with indigenous plant species. After the issuance of these orders, Brace continued to mow vegetation on the site. In October of 1988, Brace received an administrative complaint in connection with his farming activities on the site. Brace requested a hearing to contest the complaint, believing that his activities were exempt from any and all permit requirements. Prior to the hearing, the complaint was dismissed.

In the summer of 1988, Brace approached the ASCS in order to gain the status of "commenced conversion from wetlands" prior to December 23, 1985 with respect to the site. The ASCS was authorized to make such a determination under the Food Security Act of 1985, 16 U.S.C. §§ 3801, *et seq*. This Act contains a provision, referred to as the "Swampbuster," which denies certain Department of Agriculture benefits to farmers who produce an "agricultural commodity on converted wetland," unless such conversion commenced before December

23, 1985. 16 U.S.C. §§ 3821, 3822 (1988 & Supp. V 1993).

The ASCS granted the status to the site, finding that Brace's on-going farming activities had commenced prior to December of 1985, which would enable Brace to complete conversion and produce an agricultural commodity without losing USDA benefits. Letter from Erie County ASCS Office to Robert Brace (9/21/88); App. at 172. However, the ASCS expressly noted that "[t]he granting of a commencement... request does not remove other legal requirements that may be required under State or Federal water laws." USDA Form; App. at 173.

In April 1990, as a cautionary measure, Brace approached the Army Corps of Engineers ("COE") in an effort to obtain an after-the-fact permit to conduct his farming activities on the site, despite his belief that the activities were exempt from the permit requirements of the CWA. The United States Environmental Protection Agency ("EPA") requested that the COE not review an application from Brace for an after-the-fact permit. Brace was advised that because the matter was then in litigation, the government would not act on his request for a permit. Since the time of the cease and desist orders Brace has terminated farming activity on the site except for routinely mowing the vegetation.

II.

The district court exercised its jurisdiction pursuant to 33 U.S.C. § 1319(b) (1988) and 28 U.S.C. §§ 1331, 1345, 1355 (1988 & Supp. V 1993). Our jurisdiction rests on 28 U.S.C. § 1291 (1988).

Presently, there are three issues before us. The first issue is whether the district court erred in determining that Brace's discharges of dredged and fill material into the wetland were exempt from the permit requirement pursuant to Section 404(f)(1) of the CWA, 33 U.S.C. § 1344(f)(1). The second issue is whether the district court erred in determining that Brace's discharges were not "recaptured" by the permit requirement under Section 404(f)(2) of the CWA, 33 U.S.C. § 1344(f)(2). We have plenary review over the question of whether the district

court erroneously interpreted the meaning of the applicable statutes. *Moody v. Sec. Pac. Business Credit, Inc.*, 971 F.2d 1056, 1063 (3d Cir. 1992); *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 124 (3d Cir. 1991). To the extent that the court's ruling on these issues was also premised on findings of fact, we review any such findings under the clearly erroneous standard. *Zenith Radio Corp. v. Hazeltime Research, Inc.*, 395 U.S. 100, 108, 89 S. Ct. 1562, 1568 (1969); *Sheet Metal Workers Int'l Ass'n Local 19 v. 2300 Group, Inc.*, 949 F.2d 1274, 1278 (3d Cir. 1991).

The third issue is whether the district court erred in determining that Brace was not subject to liability for violations of administrative orders. Our review of questions of law such as this is plenary. *Moody*, 971 F.2d at 1063; *Manor Care*, 950 F.2d at 124.

III.

The Clean Water Act was enacted to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1988). Section 301(a) of the CWA prohibits the discharge of any pollutant into navigable waters of the United States, unless the discharge is authorized by a permit. 33 U.S.C. §§ 1311(a), 1362(12) (1988). We recognize that:

> The Act defines the operative terms of this prohibition broadly. The term "pollutants" includes fill material such as "dredged spoil, . . . rock, sand, [and] cellar dirt," 33 U.S.C. § 1362(6), and "navigable waters" means "the waters of the United States," *id.* § 1362(7). In so defining the term "navigable waters," Congress expressed a clear intent "to repudiate limits that had been placed on federal regulations by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of the term."

United States v. Pozsgai, 999 F.2d 719, 724 (3d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1052 (1994) (citations

omitted). The district court found that Brace's clearing, churning, mulching, levelling, grading, and landclearing of the formerly wooded and vegetated site was a discharge of a dredged spoil, biological material, rock and/or sand, each of which fits the definition of pollutant. *Brace*, slip op. at 18.

Section 404 of the CWA authorizes the Secretary of the Army, through the COE, to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) (1988). *See also* 33 C.F.R. § 323.1 (1993). The permit program, as we recognized in *Pozsgai*, "is the central enforcement tool of the Clean Water Act . . . Unpermitted discharge is the archetypical Clean Water Act violation, and subjects the discharger to strict liability." 999 F.2d at 724-25.

The COE and EPA have issued regulations defining the term "waters of the United States" to include "wetlands," among other bodies of water:

> (a) The term *waters of the United States* means
>
> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; . . .
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), . . . wetlands, . . . the use, degradation or destruction of which could effect interstate or foreign commerce. . .
>
> (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section . . .
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. § 328.3(a) (1993); 40 C.F.R. § 230.3(s) (1993) (emphasis in original). The district court found that the site constituted waters of the United States at the time of Brace's activities. *Brace*, slip op. at 17. The term "wetlands" is defined

as:

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. § 328.3(b); 40 C.F.R. § 230.3(t). The parties have stipulated that the site constituted wetlands at the time of Brace's activities.

Exemptions to the general requirement for a Section 404 permit are contained in Section 404(f) of the CWA. Under Section 404(f)(1), a permit is not required for: (1) the discharge of dredged or fill material "from normal farming, silviculture, and ranching activities such a plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices," 33 U.S.C. § 1344(f)(1)(A); and (2) the discharge of dredged or fill material "for the purpose of . . . the maintenance of drainage ditches." 33 U.S.C. § 1344(f)(1)(C).

The COE and EPA have promulgated regulations which provide that the "normal farming activities" exemption is available only to discharge activities that are "part of an established (*i.e.*, on-going) farming . . . operation," and expressly stipulate that the exemption is *not* available either: (1) for "[a]ctivities which bring an area into farming . . . use"; or (2) where "modifications to the hydrological regime are necessary to resume operations." 33 C.F.R. § 323.4(a)(1)(ii) (1993); 40 C.F.R. § 232.3(c)(1)(ii)(A), (B) (1993).

This provision further requires that, to be exempt from the permit requirement, such activities "must be in accordance with definitions in 33 C.F.R. § 323.4(a)(1)(iii)." 33 C.F.R. § 323.4(a)(1)(ii). The definitions in 33 C.F.R. § 323.4(a)(1)(iii) provide that "the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing."

33 C.F.R. § 323.4(a)(1)(iii)(D); 40 C.F.R. § 232.3(d)(4). The definitions also define "minor drainage" as meaning "[t]he discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands." 33 C.F.R. § 323.4(a)(1)(C)(1)(i); 40 C.F.R. § 232.3(d)(3)(i)(A). This latter definition is modified by 33 C.F.R. § 323.4(a)(1)(iii)(C)(2) and 40 C.F.R. § 232.3(d)(3)(ii), which further provide that the term minor drainage "does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland . . . . or conversion from one wetland use to another."

The COE has also promulgated definitions concerning the second exemption to the permit requirement, i.e. the exemption for the maintenance of drainage ditches. The definitions provide that the exemption from the permit requirement applies to "maintenance (but not construction) of drainage ditches." 33 C.F.R. § 323.4(a)(3).

Even where Section 404(f)(1) exempts a discharge from the permit requirements, the discharge may be "recaptured" by the permit requirement under Section 404(f)(2):

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2). The regulation governing the "recapture" provision stipulates in part that "[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of waters of the United States," 33 C.F.R. § 323.4(c), and states as an example, that "a permit will be required for the conversion of a cypress swamp to some other use . . . when there is a discharge of dredged or fill material into waters of the

United States in conjunction with construction of . . . structures used to effect such conversion." *Id.*

Thus, to be exempt from the CWA permit requirement, a defendant has the burden of demonstrating that proposed activities both *satisfy* the requirements of Section 404(f)(1) and *avoid* the recapture provision of Section 404(f)(2). *United States v. Akers*, 785 F.2d 814, 819 (9th Cir.), *cert. denied*, 479 U.S. 828, 107 S. Ct. 107 (1986). *See also United States v. Cumberland Farms*, 647 F. Supp. 1166, 1176 (D. Mass. 1986) ("[E]ven if [defendant] could establish that it is exempt from the permit requirements under § 1344(f)(1), it must also demonstrate that its activities avoid 'recapture' under the provisions of 33 U.S.C. § 1344(f)(2)."), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061, 108 S. Ct. 1016 (1988). Read together, the two parts of Section 404(f) provide a narrow exemption for agricultural activities that have little or no adverse effect on the waters of the United States. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 926 (5th Cir. 1983). Congress intended this narrow exemption. As Senator Muskie, one of the primary sponsors of the CWA, explained:

> New subsection 404(f) provides that Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively. While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do no apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.

3 *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Water Pollution Control Act*, at 474 (1978).

IV.

The district court held that Brace's activities on the thirty-acre wetland site were exempt from Section 404's permit re-

quirement "because they constitute: (a) normal farming activities; (b) upland soil and water conservation practices; and (c) maintenance of drainage ditches." *Brace*, slip op. at 22. We find that the district court's determination is erroneous as a matter of law.

The district court's conclusion that Brace's discharges on the thirty-acre site constituted "normal farming activities" which are exempt from Section 404's permit requirement cannot be reconciled with the statute, the applicable regulations, and case law governing the "normal farming activities" exemption. As we described above, Section 404(f) of the CWA provides exemptions to the general permit requirement, including the discharge of dredged or fill material without a permit in connection with "normal farming . . . activities such as plowing, seeding, cultivating, minor drainage, harvesting . . . or upland soil and water conservation practices." 33 U.S.C. § 1344(f)(1)(A). In determining that Brace's activities fell within this provision, the district court relied on facts that are irrelevant to the inquiry required by the applicable law. The district court appears to have based its conclusion on a casual observation that what Brace did was "normal" activity for a farmer in Erie County, rather than on the application of the regulatory construction accorded the statutory term "normal farming activities" by the agencies charged with the implementation of the statute.[1]

The applicable regulation provides that, to constitute "normal farming activity" within the meaning of the statute, the activity:

> must be part of an established (i.e., on-going) farming . . . operation and must be in accordance with the definitions in § 323.4(a)(1)(iii) . . . . Activities which bring an area into farming . . . use are not part of an established operation. An operation ceases to be established when the area on

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[1] See 33 U.S.C. §§ 1251(d) and 1344 for the implementation authority of the EPA and COE.

> which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.

33 C.F.R. § 323.4(a)(1)(ii). Brace's activities between 1985 and 1987 meet neither prong of this provision: they were neither part of an "established (i.e., on-going) farming operation," nor were they conducted "in accordance with the definitions in § 323.4(a)(1)(iii)."

A.

Brace points out that in determining whether farming activities are established and continuing, the conduct must be analyzed by a contextual review of the total activities. *Cumberland Farms*, 647 F. Supp. at 1175. He argues that the district court correctly undertook a contextual analysis in its determination that the site was an integral part of an established and on-going farm operation, and Brace's activities between 1985 and 1987 did not bring a new area into the operation. *Brace*, slip op. at 12. The district court based its conclusion on: (1) its determination that the site is an integral part of the drainage system previously installed in adjoining crop producing fields; (2) its finding that the installation of a drainage system at the site "is normal farming activity in order to make land suitable for farming," because "[e]xtensive underground drainage systems are typical and necessary aspects of farming in Erie County," *id.* at 3; and (3) the ASCS determination that Brace had "commenced conversion" of the site from wetland to cropland prior to December 23, 1985.

The district court's reasoning and conclusion are improper. The district court misinterpreted the meaning of the "established farming operation" requirement. The district court believed it was appropriate to examine the relationship of the site in question to the rest of the land owned by the same property-owner in determining whether land was being brought into farming use. Brace maintains that it is arbitrary to delineate artificially a portion of the farm and without rational justification sever it from his overall operations. We cannot agree with this interpretation of

the statute's requirement.

The regulations provide that, "[a]ctivities which bring an *area* into farming . . . use are not part of an established operation." 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 232.3(c)(1)(ii)(B) (emphasis added). The regulations do not specify the precise area to which we should look in determining whether there is an established farming operation. There are no minimum limits placed on the "area" being brought into farming use. Thus, we read the regulations to provide that an exemption is available only to activities that are part of an "established farming operation" *at the site*. A proper "contextual review of its total activities" only requires us to analyze whether such activities are "established and continuing" on the thirty-acre wetland site itself. *See Cumberland Farms*, 647 F. Supp. at 1175 (referring to "the site," rather than the property owner's total land holdings).[2] Our reading of the regulation recognizes the statute's legislative history and is in accord with the strict construction of the permit exemptions afforded by other Courts of Appeals. *See, e.g., Akers*, 785 F.2d at 819, 823; *United States v. Huebner*, 752 F.2d 1235, 1240-41 (7th Cir.), *cert. denied*, 474 U.S. 817, 106 S. Ct. 62 (1985); *Marsh*, 715 F.2d at 925 n.44.

Brace himself testified that: (1) for the nine-year period prior to the discharges onto the site, from 1977 to 1986, his activities at the site included no pasturing or growing of any crops, but consisted entirely of efforts to drain the wetland; (2) the site was fully covered in 1983 with indigenous plants, but that all plants had been stripped from the site in 1987, subse-

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[2] We recognize that the designation of the use of some very small sites will be effectively inseparable from the use of the surrounding land for established farming operations. Thus, we would not require that every square foot be used for farming in order for a site to meet the established operation exemption. In this case, however, it is clearly reasonable to require that all or substantially all of the thirty-acre site be part of an established operation.

quent to the discharge activities; and (3) the purpose of his 1985-1987 discharges was to drain the wetland and make it suitable for row cropping. The district court found that "*[a]s a result of* Defendants' levelling, spreading and tiling, Defendants began to grow crops on the site in 1986 and 1987." *Brace*, slip op. at 9 (emphasis added). These facts do not justify the district court's determination that Brace's activities on the site were exempt from the permit requirements as "normal farming activities." Indeed, the factual findings of the district court can only lead to the opposite conclusion. Brace converted a thirty-acre site that was not suitable for farming into a site that is suitable for farming, and thus "brought an area into farming use."

Even if Brace's father's pre-1975 use of the site for pasturing could be considered to have been a prior, "established farming operation" on the site, Brace's drainage activities demonstrate that the court erred as a matter of law in finding the exemption from the permit requirement available for his subsequent activities. Under the regulations, a farming operation is *not* "ongoing" where "modifications to the hydrological regime are necessary to resume operations." 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 232.3(c)(1)(ii)(B). Here, Brace admitted that "modifications to the hydrological regime," i.e., drainage of the site through excavating and burying four miles of plastic tubing for drainage, were necessary to grow crops on the site.

Our determination is consistent with the holdings of numerous other courts that have found the "normal farming" exemption inapplicable because modifications were required to resume farming. *See, e.g., Akers*, 785 F.2d at 819-20 ("[Defendant] argued below that unless he were allowed to complete the work he had started, the effect of which is to drain the wetland, he would be unable to engage in the farming activities he had planned. By his own admission, his activities require substantial hydrological alteration to [the site], and run afoul of the regulations."); *Bayou Marcus Livestock & Agric. Co. v. EPA*, No. 88-30275, 20 Envtl. L. Rev. (Envtl. L. Inst.) 20445, 20446 (N.D. Fla. Nov. 3, 1989) ("Before plaintiffs could have effec-

tively harvested the timber and begun farming, it was necessary to dredge, fill, construct roads and dig ditches . . . . [I]f an ongoing operation had been previously functioning, such changes in the landscape would have been unnecessary."); *United States v. Larkins*, 657 F. Supp. 76, 85-86 n.23 (W.D. Ky. 1987) ("Activities cease to be established when the property on which they were once conducted '. . . *has lain idle so long that modifications to the hydrological regime are necessary to resume operations*.' Reducing the reach of the [site] required modifications of the site's hydrological regime. Consequently, even if the wetland had a history of farm use, that use was no longer established at the time [of defendant's activities]." (emphasis by court) (citations omitted)), *aff'd*, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 489 U.S. 1016, 109 S. Ct. 1131 (1989).

Brace suggests that this line of cases is distinguishable from his circumstances because of, *inter alia*, the larger size of the farms and wetlands at issue in those cases, and the fact that one site was a habitat for an endangered species. We cannot agree. There is no provision in Section 404(f)(1) of the CWA or its implementing regulations under which either the size of a wetland or the effect of discharge activities on wildlife are factors relevant to determining whether particular discharge activities are exempt from the permit requirement. Although wetland protection is Section 404 serves the important function of protecting wildlife habitats, in addition to several other functions including flood and erosion control and water purification *see* 33 C.F.R. § 320.4(b)(2), neither the statute nor the regulations condition the permit requirement on the existence of adverse impacts on wildlife or on the particular size of a wetland. Indeed, we have upheld determinations of both civil and criminal liability for the discharge of fill material onto a 14-acre wetland site, a substantially smaller site than Brace's, where there was no claim of adverse impact on wildlife. *United States v. Pozsgai*, 999 F.2d 719 (3d Cir. 1993), *cert. denied*, _____ U.S. _____, 114 S. Ct 1052 (1994) (civil), and *United States v. Pozsgai*, 897 F.2d 524 (3d Cir.), *cert. denied*, 498 U.S. 812, 111 S. Ct. 48 (1990) (criminal).

In addition to the district court's erroneous interpretation of the "established farming operation" requirement, the district court erred as a matter of law in finding that Brace's installation of a drainage system at the site "is a normal farming activity in order to make land suitable for farming," because "[e]xtensive underground drainage systems are typical and necessary aspects of farming in Erie County." *Brace*, slip op. at 3. Brace argues that the court correctly considered the area-specific context in its fact finding inquiry. However, the factual determination is a legal conclusion, and is not merely a matter for factual findings. The question is not whether farmers in a particular county install extensive drainage systems. Rather, the proper question is whether the activities performed by Brace at this particular site, and at a time when the CWA applied, were within the meaning of the statutory term "normal farming activities" as defined by the regulations. Regardless of how "typical" or "necessary" such drainage systems may be in Erie County, Section 404 of the CWA requires a permit for "activities which bring an area into farming . . . use," as opposed to activities that are part of an "established farming operation." Brace did not have an "established farming operation" on the site prior to his discharges, and brought the site into farming use by discharging pollutants into waters of the United States.

Moreover, the district court erred in relying upon a determination from the ASCS in September of 1988 that Brace had "commenced conversion" of his property from wetland to cropland prior to December 23, 1985, as evidence of an "established farming operation" at the site. The USDA Swampbuster Commenced and Third-Party Determinations form signed by Brace expressly states that "[t]he granting of a commencement . . . does not remove other legal requirements that may be required under State or Federal water laws." USDA Form; App. at 173. The purpose of the "commenced conversion" determination is solely to prevent the loss of USDA benefits. The ASCS determination is not a dispositive factor in our analysis.

Moreover, to the extent that the ASCS determination has any relevance to our analysis of "normal farming activities," it

undermines such a conclusion. The very title of the determination — "commenced conversion" — indicates that Brace's discharge activities were not part of an ongoing farming operation, but rather, were directed at *converting* the wetland to the farming operation of growing crops. Even if the ASCS determination had stated that a conversion had been *completed* by December 23, 1985, the CWA permit requirement would not have been affected. Brace's activities were unpermitted and unauthorized when they occurred, and the "commenced conversion" determination provides no basis for an after-the-fact legitimization of those activities.

B.

As we explained above, the regulation governing the "normal farming activities" exemption has a second prong, under which drainage activities, in addition to being a part of an "established farming operation" as defined by the regulation, must be "in accordance with definitions in § 323.4(a)(1)(iii)." 33 C.F.R. § 323.4(a)(1)(ii). Brace's activities failed to meet the requirements of this second prong in addition to not being a part of an ongoing, established farming operation. Brace's undisputed activities: (1) excavating soil and discharging in connection with burying approximately four miles of plastic tubing for drainage; (2) levelling and clearing the formerly wooded and vegetated site; and (3) spreading dredged material, are all excluded from the activities allowed under 33 C.F.R. § 323.4(a)(1)(iii).

Brace's installation of four miles of tubing which drains the site is barred by the provision's express prohibition of both: (1) "the construction of any . . . structure which drains or otherwise significantly modifies . . . a wetland or aquatic area constituting waters of the United States"; and (2) "drainage associated with the immediate or gradual conversion of a wetland to a non-wetland . . . , or conversion from one wetland use to another." 33 C.F.R. § 323.4(a)(1)(iii)(C)(2). *See also* 40 C.F.R. § 232.2(d)(3)(D)(ii). Brace's clearing of all vegetation from the wetland site, and his spreading of dredged materials onto the

site, are barred by the provision's express prohibition of both: (1) "the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dryland"; and (2) "the redistribution of surface materials by blading, grading, or other means to fill in wetland areas." 33 C.F.R. § 323.4(a)(1)(iii)(D). *See also* 40 C.F.R. § 232.3(d)(4). Accordingly, by definition, Brace's discharge activities cannot constitute "normal farming activities" under the applicable regulation.

We are unpersuaded by Brace's assertion that we need not reach the definitions of 33 C.F.R. § 323.4(a)(1)(iii) because there was no conversion from one wetland use to another. Brace bases his argument on the district court's determination that Brace simply *maintained* and improved his drainage system, and continued, piece by piece, to farm land which, in one form or another, had always been used for crops or pasture. Brace asserts that spreading materials that he dredged from ditches on the site onto other portions of the site was an ordinary and normal maintenance procedure employed by local farmers. Under the CWA, a permit is not required for the discharge of dredged or fill material for the purpose of maintaining drainage ditches. 33 U.S.C. § 1344(f)(1)(C). Thus, Brace argues and the district court agreed that Brace's activities constituted maintenance of drainage ditches, an activity clearly exempt from the permit requirements of the CWA.

The exemption from the permit requirements under Section 404(f)(1)(C) for "maintenance of drainage ditches" applies to "any discharge of dredged or fill material that may result from . . . the *maintenance* (*but not construction*) of drainage ditches." 33 C.F.R. § 323.4(a)(3) (emphasis added). We find the district court erred as a matter of law in finding that Brace was simply maintaining rather than constructing the drainage ditches. Likewise, the conclusion of the district court that the activities of Brace do not require a permit because they constitute maintenance of drainage ditches, Brace, slip op. at 22, is not supported by the evidence. Brace caused the excavation of the site

and the burying of several miles of plastic tubing to facilitate drainage. It is not realistic to describe what Brace was doing as "continuing maintenance." Brace's construction of a drainage system as expressly prohibited by the regulation absent a permit. *See Huebner*, 752 F.2d at 1242 (defendants' cleaning and deepening existing ditches, excavating a new ditch, and discharging dredged materials required a permit when it brought an area of navigable waters into a use to which it was not previously subject).

Moreover, any activity that could be described as maintenance of drainage ditches was accomplished, if at all, by dredging ditches at the site. Brace's subsequent levelling at the site and spreading of the dredged material were separate, independent activities that are not subject to an exemption from the permit requirement. This subsequent spreading of dredged materials onto other portions of the site served no purpose beyond converting the thirty-acre wetland site to an upland site that could accommodate the growing of crops; it did not "result" from the maintenance of drainage ditches. There is no statutory or regulatory provision under which the spreading of the dredged materials is permissible absent a permit. The district court erred as a matter of law in holding Brace's activities permissible.

V.

As we discussed above, Brace has the burden of proving both that he qualified under Section 404(f)(1) for the normal farming activities exemption, and that the permit requirement was not "recaptured" under Section 404(f)(2) of the CWA, 33 U.S.C. § 1344(f)(2). The "recapture" provision stipulates that:

> Any discharge of dredged of fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2). The applicable regulation provides that "[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of the waters of the United States." 33 C.F.R. § 323.4(c).

Initially, the district court incorrectly stated that the application of the recapture provision required the United States to establish the two elements;

First, it must be established that Brace's activities were conducted in order to bring the property into a use to which it was not previously subject. Second, if this element is established, it must then be established that Brace's activities will impair the flow or circulation of navigable waters or will reduce the reach of such waters.

Brace, slip op. at 21. The court's articulation of the legal standard implies that the burden of demonstrating "recapture" is on the United States. This legal standard is erroneous.

Since we have held that Brace's drainage activities on the thirty-acre wetland site are not exempt from the CWA permit requirement under the "normal farming activities" or maintenance of drainage ditches exemptions, we need not reach the application of the recapture provision. We note, however, that the district court's conclusion that the recapture provision does not apply because "[t]he land is not being converted to a use to which it was not previously subject, nor has significant impairment to reach or flow of waters been proven," *Brace*, slip op. at 22, is incorrect as a matter of law. The evidence establishes that Brace's activities drained the site to convert it from a wetland to a new, non-wetland use; the district court found that the site was inundated with water at various times in the past; the parties stipulated, and the court found, that the site constituted a wetland at the time of the discharges; Brace admitted that the purpose of installing the four miles of plastic tubing at the site in 1986 and 1987, and of clearing the vegetation from the site between 1985 and 1987, was to drain the site and make the ground ready for growing crops; and the court found that as a result of Brace's levelling, spreading and tilting, he began to

grow crops on the site in 1986 and 1987. Thus, Brace's activities fall squarely within the statutory definition of "recapture."

VI.

The last issue that we must address is that of Brace's penalty of violations of the permit requirements of Section 404 of the CWA and for his violations of the EPA administrative orders. Clearly, under the CWA Section 309(d), Brace is subject to a civil penalty for his violation of the CWA permit requirements. 33 U.S.C. § 1319(d) (1988).[3] Upon remand the district court must determine the appropriate amount of the penalty, based on the statutory factors delineated in Section 309(d).

The more difficult issue is whether Brace is also subject to civil penalties for his noncompliance with the EPA administrative orders. The district court found both that: (1) the EPA's administrative order had required Brace "to cease and desist all activities on the site," *Brace*, slip op. at 14; and (2) "Defendants failed to totally comply with Administrative Orders issued to them." *Brace*, slip op. at 14. However, the district court did not attach liability for violating the orders, based on its findings at "Defendants have not disturbed the soil on the site in any significant way since being served with the cease and desist orders, and in the view of this Court acted only out of sincere conviction, although undoubtedly misguided." *Id.*

Section 309(d) provides that "any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty." 33 U.S.C. § 1319(d).

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[3] Section 1319(d) provides in pertinent part:

> Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section . . . 1344 of this title by a State, . . . and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for

Section 309(d) does not afford the district court discretion to grant an exemption from liability for violating the EPA administrative orders. *See, e.g., Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990) (the language of Section 309(d) "makes clear that once a violation has been established, some form of penalty is required.") However, the record is not sufficiently clear for us to determine whether civil penalties are mandatory under the circumstances of this case. We remand this issue to the district court for further review of Brace's non-compliance with the EPA administrative orders. Thereafter, the district court must determine what, if any, civil penalties should be assessed against Brace for his violations of the EPA administrative orders.

VII. CONCLUSION

For the foregoing reasons, the order entered December 17, 1993, granting judgment in favor of the defendants, Robert Brace and Robert Brace Farms, Inc., will be reversed. This matter will be remanded to the district court to enter judgment in favor of the United States and to assess upon further proceedings appropriate penalties for defendants' violations of the permit requirements, and to assess what, if any, penalties are appropriate for violations of the EPA administrative orders.

A True Copy:

Teste:

Clerk of the United States Court of Appeals

for the Third Circuit

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each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3076

UNITED STATES OF AMERICA,
Appellant

v.

ROBERT BRACE;
ROBERT BRACE FARMS,
a Pennsylvania Corporation

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge; BECKER, STAPLETON, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MC KEE and SAROKIN Circuit Judges; and POLLAK*, District Judge

The petition for rehearing filed by appellees having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: January 9, 1995

RELEVANT STATUTORY AND REGULATORY PROVISIONS

33 U.S.C. § 1311(a) provides:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1344(a) provides in relevant part:

> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(f) provides in relevant part:

> (1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material —
>
> (a) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
>
> * * *
>
> is not prohibited by or otherwise subject to regulation under this section or section 301(a) or 402 of this Act[.]
>
> (2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 C.F.R. § 323.4 provides in relevant part:

> (a) General. Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under section 404:
>
> (1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.
>
> (ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming silviculture, or ranching operation and must be in accordance with definitions in § 323.4(a)(1)(iii). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been coverted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.